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Hestead v. CNA Supply Respondent's Brief Dckt. 38467

IN THE SUPREME COURT OF THE STATE OF IDAHO

NICK HESTEAD Plaintiff/Respondent Cross Appellant vs. CNA SURETY dba WESTERN SURETY COMPANY Defendant/Appellant Cross Respojndent	Docket No 38467 RESPONDENTS/CROSS APPELLANTS BRIEF

RESPONDENTS/CROSS APPELLANTS BRIEF - NICK HESTEAD

Appeal from the District Court of the Third Judicial District
of the State of Idaho, in and for the County of Canyon
Honorable Susan E. Wiebe, District Judge, Presiding

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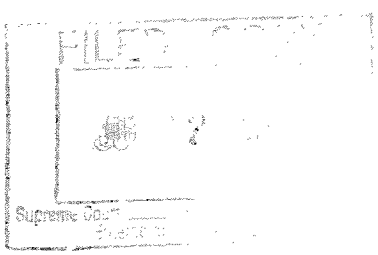

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STATEMENT OF THE CASE

1
NATURE OF THE CASE

This controversy arises out of competing claims upon an automobile dealer licensing statutory bond provided by (Appellant/Defendant) Western Surety to Best of the Best Auto Sales Inc, pursuant to Idaho Code 49-1608 and 49-1610.

An auto auction claim on the bond for a dishonored check and one for a dishonored check plus additional damage were sent directly to Western Surety for payment. The checks were for vehicles Best of the Best purchased. The claims were initially denied, and then the auctions withheld vehicle titles from bona fide purchasers. Eventually they were paid by Western Surety in the total amount of the bond - $20,000 in the summer of 2009.

(Respondent/Cross Appellant/Plaintiff) Nick Hestead purchased a 2004 Ford F 350 from Best of the Best in June 2007, but it had an undisclosed branded lemon title from California and had problems. He filed a lawsuit and proceeded through the Court system, finding out in August, 2009 that Western Surety had paid its bond amount to the auto auctions. Hestead obtained a Judgment in March, 2010 and made a bond claim based upon the Judgment and in accord with Idaho Code 49-1610(4).. Western Surety responded that the bond had been paid and was "exhausted".

Nick Hestead maintains the bond is not exhausted and can only be paid after obtaining a judgment. Idaho Code 49-1610 provides a "claim" cannot even be filed with the surety until a judgment is 30 days old. The "process" in subdivision 4 of this statute must be satisfied before a claim can be paid by the surety. Hestead also suggests that Western Surety

could have filed an interpleader to exhaust the bond, and take reasonable steps to give notice to all potential claimants since there were no judgment claimants at the time.

Western Surety maintains that the requirement of a judgment leads to absurd results, higher costs, and a waiting period. They contend a key sentence in Idaho Code 41-1839 (3) makes Western Surety an "involuntary" payor so long as Western Surety acts in good faith in paying any "claim" presented to it, whether that "claim" complies with Idaho Code 49-1610 or not

Nick Hestead counters that there is no constitutional, common law or other legal duty for the Legislature to require a bond; the requirement of a judgment is found in many automobile dealer bond statutes throughout the United States; Western Surety is well aware of this requirement, several state courts have required the judgment "process" in their automobile dealer bond statutes to be followed; and "involuntary" means Western Surety can recover improper payments from payees, indemnitors, and subrogees, providing it acts in good faith.

The Honorable Susan Wiebe found that Idaho Code 49-1610 is a specific statute applicable to this controversy, mentioned the word "judgment" at least four times, and must be followed. She said Western Surety acted in good faith, but did not comply with the statute. She awarded $12,500 in damages.

Nick Hestead asks that the Summary Judgment be affirmed and in a cross appeal asks that the Supreme Court find that the sales tax and interest paid by Hestead to the lender are "damage or loss" covered by the bond.

Both parties ask for attorneys fees under Idaho Code 41-1839.

2.
COURSE OF PROCEEDINGS

Nick Hestead agrees with the Course of Proceedings discussion in Appellants Brief, except for the statement on Page 16 that "The Motions were heard on December 10, 2010. Tr. Vol 1)". Only Nick Hesteads Motion for Summary Judgment and Western Surety's Motion to Strike two affidavits for consideration were heard on that date. Western Surety's Motion for Summary Judgment was to be heard on December 30, 2010. (Tr Vol 1 P 4 L 17-22).

3.
STATEMENT OF FACTS

A
NICK HESTEAD BOUGHT A TRUCK WHICH WAS AN UNDISCLOSED BRANDED LEMON FROM BEST OF THE BEST AND OBTAINED A JUDGMENT

CNA Surety dba Western Surety writes surety bonds under automobile dealer licensing statutes. It apparently writes them throughout the United States as it has been a party to many reported cases.

Western Surety has been writing automobile surety bonds for at least 10 years in Idaho and is fully aware of the requirements of Idaho Code 49-1610. In a letter dated February 18, 2000 to an attorney for a used car dealer, Western Surety Assistant Vice President Michael Dow, stated "Subsection (4) of Section 49--1610 of the Idaho Code provides for recovery under the bond as follows:" and then quotes verbatim Subsection (4). (R.Vol 1 p 32-33)

During the year 2007 Western Surety provided a $20,000 bond pursuant to Idaho Code

49-1610 on behalf of Best of the Best Auto Sales Inc. (R.Vol 1 p 17- Statement of Uncontested Facts; R.Vol 1 p 10 - Answer) .

On or about June 7, 2007, Nick Hestead entered into an agreement to purchase a Ford F350 from Best of the Best Auto Sales Inc (R.Vol 1 p 99, 108). He financed the purchase through his credit union and is still repaying the loan. (R.Vol 1 p 101 - Dep Hestead P 12 L 10-11). The truck subsequently turned out to be a branded lemon, with many problems in the past and even had problems just three weeks before Nick Hesteads deposition on October 19, 2010. (R.Vol 1 p 101- Dep Hestead P 12 L 19-25; P 13 L 1-5). When Nick Hestead decided to get rid of the vehicle he went to Dan Wiebold and learned the vehicle was worth much less than he thought because of the lemon brand. (R.Vol 1 p 102 - Dep Hestead P 19 L 12-25).

On September 2, 2008, a lawsuit was filed against Ron Zechman dba Best of the Best Auto Sales. (R. Vol 1 p 106 - Dep Hestead 34 L 11-13). The lawsuit alleged Best of the Best sold the F 350 Ford Truck to Morgan Creek Homes on December 18, 2006, disclosing the Lemon Law Buy Back, but Best of the Best did not disclose this fact to Nick Hestead when he bought the truck a year later. (R.Vol 1 p 110; Complaint Paragraph IX). The lawsuit alleged this is an unfair and deceptive act and practice and violates the Idaho Consumer Protection Act (Count II) and is a breach of express and implied warranties (Count I) (R.Vol 1 p 108 -110)

The lawsuit asked for damages consisting of the diminished value of the truck $12,500 , the amount of the sales tax on $12,500 which is $750, and "interest Plaintiff has paid on borrowed funds of $12,500 which he incurred in order to purchase the vehicle."

(R.Vol 1 p 110 - Complaint Paragraph XI).

The lawsuit eventually went to trial and took a day. (R. Vol 1 p 104 - Dep Hestead P 25 L20-22). The Honorable James Morfitt entered Judgment for Nick Hestead, finding

> "Defendant Best of the Best Auto Sales Inc violated Idaho Transportation Department IDAPA Regulation 39.02.07.400 relating to required disclosures of branded titles, the Idaho Consumer Protection Act at Idaho Code 48-603(7), (14), (17) and breached express and implied warranties under the Uniform Commercial Code"

(R. Vol 1 p 29)

Judge Morfitt then awarded Nick Hestead damages of $12,500, plus interest from the date of purchase at the rate of 10.9% on that amount which totals $3729, and sales tax damage of $750. (R.Vol 1 p 29)

B.
TWO AUTO AUCTIONS WERE GIVEN INSUFFICIENT FUNDS CHECKS FOR VEHICLES BEST OF THE BEST PURCHASED AND MADE DIRECT CLAIMS ON THE WESTERN SURETY BOND

Meanwhile in 2008, a business entity wrote checks to two auto auctions that were not honored. The auto auctions did not go to Court. Instead they directly sent demand letters to Western Surety.

One check was from "Best of the Best Auto Sales dba Z's Paint and Body Ron Zechman Sr". to Brashers Idaho Auto Auction for $9,360. and dated September 19, 2008. (R.Vol 2 p 140). Brashers sent a claim directly to Western Surety which was received by Western Surety on November 13, 2008. (R. Vol 2 p 139) Brashers attached three invoices dated April 24, 2008, to support its claim. (R.Vol 2 p 141-143). Apparently Brashsers had

extended some kind of credit to this entity from April to September.

Dealers Auction made its claim against "Principal: Ron Zechman dba Best of the Best" in its letter of October 10, 2008. (R.Vol 2 p 133) The letter states: "Ron Zechman dba Best of the Best obtained vehicles from Dealers pursuant to his agreement with Dealers with the intent to defraud Dealer's as evidenced by his continuous payment of insufficient funds by way of check." (R. Vol 2 p 133). On December 16, 2008, Dealers sent a letter with the same language, except it stated "Principal: Best of the Best Inc." and substituted "Ron Zechman dba Best of the Best Auto Sales Inc ". (R.Vol II p 134)

Dealers Auto Auction was given an insufficient funds check on or about June 4, 2008, in the amount of $8,810. (R.Vol II p 131). A summary dated September 22, 2008, and addressed to "Ron Best of the Best", shows that 7 cars were unpaid as of that date. (R.Vol II p 130). It appears that a 1998 Alero was acquired on February 15, 2006 and still not paid for.(R. Vol II p 130). Thereafter Dealers apparently extended credit for purchases of 6 other vehicles throughout 2007. (R.Vol II p 130).

The record appears to show that the purchasers of these vehicles paid for their vehicles and were bona fide purchasers. (R. Vol II p 157 May 4, 2009 email "Western Surety received a phone call from bona fide purchaser Selena Mata.").

Western Surety denied the claims of the auto auctions. But, then the auctions said they would not release remaining vehicle titles until the checks and vehicles were paid. The auctions told the bona fide purchasers to make claims upon the Western Surety bond which a couple did and thereafter the auctions accepted payments from Western Surety and released

titles

(Nick Hestead seriously questions whether the auctions had the right to withhold titles because the auctions knew Best of the Best would sell the vehicles to bona fide purchasers for value)

C.
NICK HESTEAD MADE A CLAIM
ON THE WESTERN SURETY BOND AND COMPLIED WITH THE
PROCEDURE IN IDAHO CODE 49-1610

Western Surety points out that 30 days after an order was entered by Judge Brad Ford, Nick Hestead filed a claim through the Idaho Transportation Department based upon two Orders that were entered. (R.Vol II 162-166) (Appellants Brief P 14 -15).

Hestead did in fact recognize that Idaho Code 49-1610 required a judgment stating in the September 19, 2009 letter that this was the language in Idaho Code 49-1610 and detailing that position. At the end of the letter Hesteads counsel stated "I believe the Order is the equivalent of a Judgment under Idaho law." (R.Vol II p 174 last paragraph). With regard to that statement it is important to note the amount of the claim was minimal - $877.50 and counsel thought that generally orders sometimes can be judgments, and quite frankly, not much time was spent at this point. The Supreme Court has made the distinction very clear in two recent cases. Spokane Structures Inc v Equitable Investment 148 Idaho 616, 226 P.3rd 1263 (2010); T.J.T. Inc v Mori 148 Idaho 825, 230 P.3d 425 (2010) Nick Hestead concedes that these orders are not "judgments".

The important fact to be gleaned from this discussion is that no claim was made on the bond for the damage Nick Hestead claimed as a result of the deception by Best of the Best

until Hestead obtained a judgment. And, the claim based upon the two orders for $877.50 was made through the "custodian of the bond" the Idaho Transportation Department. (R.Vol 1 p 89 - ITD Letter, last paragraph)

After Judge Morfitt entered judgment, demand was made upon Western Surety for payment under the bond.

Western Surety admitted in its Answer that

1. Demand has been made upon Best of the Best Auto Sales Inc for payment of the judgment and no payment was made within 30 days. (R. Vol 1 p 11 - Answer Paragraph 14)

2. Plaintiff Nick Hestead made a sworn demand upon Western Surety within one (1) year of the Judgment and after 30 days after the date of the Judgment. (R.Vol 1 p 12 Answer Paragraph 17)

3. No person, entity or organization has obtained a Judgment against Best of the Best Auto Sales Inc and made a claim upon the bond. (R.Vol 1 p .12 Answer Paragraph 19)

Western Surety denied that the Judgment is covered by the bond on the basis that the "bond has been exhausted". (R.Vol 1 p.12 Answer Paragraph 16 & First Affirmative Defense).

D.
THE IDAHO TRANSPORTATION DEPARTMENT TAKES NO POSITION WITH REGARD TO THE PROCEDURE FOR PAYMENT OF AUTO DEALER BOND CLAIMS

Daryl Marler has been Dealer Licensing Program Supervisor Daryl at the Idaho Department of Transportation for 5 ½ years. (R.75 Dep Marler P 4 L 17- 19). He directs dealer licensing which involves licensing, auditing, monitoring, and enforcement upon all

motor vehicle dealers, and he directs motor vehicle investigations.(R.75 (Dep Marler P 5 L 9-20) He stated that there is a specific statute - Idaho Code 49-1610 and/or 49-1608 - that deals with the conditions under which a dealers bond can be liable for a claim.(R.75 Dep Marler P 6 L10-16). He at no time in the deposition referenced or was even asked about Idaho Code 41-1839. (R.73-88.Dep Marler).

Mr.Marler's testimony was very clear that ITD has not taken a position regarding whether Judgments are or are not required for bond payments. He testified:

> Q. And does your department have a position on whether or not sureties can pay claims made by consumers in Idaho on the motor vehicle dealer bonds without having a judgment?
>
> A. To my knowledge we don't make any - any- any statements in regard to the validity of the claim or anything else. Its just we send it in, and then its up to the surety company and then the complainant.
>
> (R.30 Dep Marler P 30 L 15-22)
>
> Q Now does your department ever, in its interactions with sureties take a position with the surety as to whether or not a particular claim ought to be paid?
>
> A. No
>
> (R.83 Dep Marler P 38 L 24-25; P 39 L 1-3)
>
> Q. Does your department have a manual, other than an employment manual?
>
> A. We do have a dealer operations procedure manual.
>
> Q. How many pages long is that?
>
> A. It includes the manual for investigations and for dealer licensing and I'm guessing it probably somewhere around - single sided sheets. I don't remember how many pages it has, but its - covers a lot of issues.

Q. Do you know, does it cover surety issues at all?

A. No

Q.Does it cover bond issues at all?

A. I don't think there's anything mentioned - under the dealer licensing part there is about the requirement for the dealer bond and stuff like that, but as far as handling bond claims and things like that, there's nothing I am aware of.

(R.85 Marler Dep P45-46).

ADDITIONAL ISSUES PRESENTED ON APPEAL

1. Is Nick Hestead entitled to Attorneys Fees pursuant to Idaho Code 41-1839

2. Did the Trial Court commit error when it did not award the sales tax and interest paid the lender as a "loss or damage" under Idaho Code 49-1610

ARGUMENT

1

THE WESTERN SURETY BOND IS A STATUTORY BOND AND ITS ACTIONS MUST BE IN ACCORD WITH THE BOND STATUTES. IT CANNOT REWRITE OR REVISE IDAHO LAW

The Western Surety bond is a statutory bond, not an insurance policy. As a statutory bond it must follow the procedures in the statute, just as a claimant must do.

Bryant Motors v American States Insurance 118 Idaho 796, 800 P.2d 683 (Ct App 1990) discussed whether there is coverage of particular claims and persons under Idaho's

automobile bond statute. The case states general rules regarding the auto bond as follows:

> "The obligation of a surety on a bond required by statute is determined by the provisions of the statute. Royal Indemnity Co. of New York v Business Factors Inc.96 Ariz 165, 393 P.2d 261 (1964). Thus such bonds are construed in the light of the statute creating the obligations secured and of the purposes for which the bond is required, as expressed in the statute. (citation omitted). ....It is presumed that the intention of the parties was to execute a bond such as the law required. 12 Am Jur 2d Bonds Section 26 at 495-96 (1964)
>
> 118 Idaho at 798

Bryant was cited with approval in a subsequent case. In Seubert Excavators v Eucon Corp 125 Idaho 409 at 417, 871 P.2d 826 (1994) our Supreme Court said:

> " Furthermore, it is a principle of Idaho law that the obligation of a surety on a bond required by statute is determined by the obligations and purposes set forth in the statute. Bryant Motors Inc v American States Inc 118 Idaho 796, 798, 800 P.2d 683, 685 ....."

Idaho's law regarding an auto dealers bond includes two statutes: Idaho Code 49-1608 and Idaho Code 49-1610. Idaho Code 49-1608 both at the time applicable in this case, and now, require in pertinent part:

> " Before any dealer's license shall be issued by the department to any applicant the applicant shall procure and file with the department good and sufficient bond in the amount shown, conditioned that the applicant shall not practice any fraud, make any fraudulent representation or violate any of the provisions of this chapter, rules of the department, or the provisions of chapter 5, title 49, section 49-1418, or chapter 6, title 48, Idaho Code, or federal motor vehicle safety standards, or odometer fraud in the conduct of the business for which he is licensed."

The next applicable section, Idaho Code 49-1610, refers to "Process". In pertinent part it states:

> "**49-1610 . Right of action for loss by fraud - Process.** - (1) If any person shall suffer any loss or damage by reason of any fraud practiced on him or

fraudulent representations made to him by a licensed dealer or one (1) of the dealer's salesmen acting for the dealer, in his behalf or within the scope of the employment of salesman, or shall suffer any loss or damage by reason of the violation by the dealer or salesman of any of the provisions of this chapter, or chapter 5, title 49, Idaho Code, or section 49-1418, Idaho Code or chapter 6, title 48 Idaho Code, or any applicable rule or regulation of the board, or federal odometer law or regulation, that person shall have a right of action against the dealer and his salesman.

(2) .....

(3).....

(4) Whenever any person is awarded a final judgment in a court of competent jurisdiction in the state of Idaho for any loss or damage by reason of the violation by such dealer or salesman of any of the provisions of this chapter, chapter 5, title 49, section 49-1418, or chapter 6, title 48, Idaho Code, or any rule or regulation of the department in connection with the purchase of a vehicle, or federal motor vehicle safety standards, or in connection with the purchase of a vehicle if the loss or damage is a result of odometer tampering or odometer fraud, the judgment creditor may file a verified claim with the corporate surety who has provided the dealer's surety bond, or with the chairman of the dealer advisory board where the dealer has deposited with the director a cash bond or certificate of deposit.

(a) The claim shall be filed no sooner than thirty(30) days and no later than one (1) year after the judgment has become final.

(b) The claim shall:

(1) Be accompanied by a certified copy of the judgment

(2) State the amount of the claim if different from the judgment amount and

(3) State that demand has been made upon the dealer for payment of the Judgment, and the dealer has failed to pay the judgment in full within thirty (30) days.

I.C. 49-1610 is not ambiguous. Its title is "Process". Subdivision 4 seems straightforward, and nowhere in Western Surety's 43 page brief does Western Surety claim it is ambiguous. Subsection (4) (a) mandates that the claim "shall be filed no sooner than thirty (30) days and no later than one (1) year after the judgment has become final". The Supreme Court has held that "shall" when used in a statute imposes a mandatory obligation. (Mendenhall v Aldous 146 Idaho 434 at 438 note 4 (2008).

Subsection (4) uses the word "Judgment" four times, as stated by Trial Court Judge Susan Wiebe in her bench decision. (Transcript P 19) . It consistently uses the term "shall".

Thus, Nick Hestead does not understand how Western Surety can say that a claim can be filed anytime, and paid any time when subsection (4)(a) states it can't be.

Nick Hestead followed the statutory process for making a claim on Best of the Best Auto Sales Inc's bond. (R.Vol 1 p 12 Answer Paragraph 17). No other purported claimant has ever done so. Hestead has obtained a judgment that clearly states that violations of Idaho Code 49-1610 have occurred and that judgment has been presented in accordance with the judgment claims procedure. (R.Vol 1 p 29-30)

Western Surety cannot unilaterally rewrite this statute, and claim that the "Process" means nothing. Western Surety is simply writing this procedure out of the Idaho Code. Section 4 of Idaho Code 49-1610 becomes meaningless and mere surplusage if a surety can pay any claim that comes into its offices without regard as to whether there is a judgment. As our Supreme Court has stated:

> "If possible, it is incumbent upon a court to give a statute an interpretation which will not in effect nullify it" (DeRouse v Higgensen 95 Idaho 173,176)

In Dohl v PSF Industries Inc 899 P.2d 445, 127 Idaho 232 (1995) our Supreme Court said:

> "Statutes are to be construed to ascertain and give effect to the purpose of the legislation and to give force and effect to every part of the provision. (Citation omitted) ....
>
> We will not presume that the legislature performed the idle act of enacting a superfluous statute."

A.

THE JUDGMENT REQUIREMENT IS A RESULT OF A LEGISLATIVE DECISION BASED UPON COMPETING ARGUMENTS AND POLICIES AND LEGISLATURES AROUND THE COUNTRY REQUIRE JUDGMENTS

There is no constitutional, common law, or extrinsic rule that requires that a legislature set up an automobile dealer bond. system. The decision to do so, and the parameters of claims and payments have been set up by legislatures around the country after considering many arguments and suggestions, including those advanced. by Western Surety in its brief. Our Legislature has chosen Idaho Code 49-1610, which requires judgments. Some other states allow a direct action (Washington - RCWA 46.70.070), many require judgments (infra), some require execution upon judgments before filing a claim (infra), and some provide for administrative resolution of judgments. (infra).

Western Surety expresses a dislike for our Idaho system. It claims in its brief that Plaintiff position would lead to "absurb, and unreasonably harsh results." (App Br 35). It claims 'Claimants would be forced to wait until the statute of limitations had run..." (App Br 36).

On the other hand, one very good reason is that a Judgment provides certainty that the claim is valid. This serves the creditor, dealer and the bond company. The bond company can pursue its claim for indemnification and the dealer cannot claim the bond company improperly paid the claim. The bond company is exonerated from any bad faith or other claim by its principal or guarantor or creditor. The dealer is secure knowing the bond company won't pay a claim with which the dealer disagrees. Yet, the creditor knows the claim will still

be paid if the creditor prevails.

And a Judgment is a public record, giving notice to others of the a potential bond claim.

In addition, a dealer who defends a claim in Court incurs attorneys fees and expense and knows the bond is in the wings, all of which should promote settlement in the smaller cases that are typical of vehicle disputes. Small Claims Court is available for many of the disputes that typically arise between a dealer and its customers.

A surety shouldn't be able to pick and choose who will be paid..

But regardless of how Nick Hestead or Western Surety feels, the determination has been made by the Legislature.

B.
MANY STATES REQUIRE A JUDGMENT AGAINST THE AUTO DEALER FOR A BOND CLAIM TO BE PAID

Missouri requires a judgment. Western Surety even litigated a reported interpleader case in connection with this Missouri statute. (Western Surety Company v Intrust Bank 20 S.W.3d 566 (Mo App W.D.2000) stating at 570 that "**Considering the language of Section 301.588.1(4) it is significant that the triggering event for payment of the proceeds of the bond is the receipt of a final judgment.**" (Emphasis added)

Colorado requires a judgment before an auto dealer bond must make payment and Western Surety has litigated a case there concerning whether an unpaid Judgment was entirely covered by the bond. (Edmonds v Western Surety 962 P.2d 323 (Colo App 1998)

The Judgment requirement is widely used throughout the United States. Some states

have even more restrictive procedures. Here are some examples:

Alabama - A claim may be made after a judgment is entered against the principal (dealer) by filing the Judgment with an administrative body. (Ala Admin Code 810-8--509) (3) (4). Alabama even requires that the judgment creditor try to collect from other sources before filing the claim.

Indiana - Ind.Code 9-23-2-2(e) requires a $25,000 bond to cover fines and penalties and to secure the "payment of damages to a person aggrieved by a violation of this chapter by the licensee after a judgment has been obtained."

Kansas - Requires a final judgment be presented to the Director who then makes an administrative determination as to whether the Judgment should be paid from the Bond. (K.S.A. 8-2404)

Montana - Montana requires that a person who suffers loss or damage....."shall obtain a judgment from a court of competent jurisdiction prior to collecting on the bond of the dealer broker, wholesaler, or auto auction." ..... (MCA 61- 4- 126) (1) & (2)

C.
THREE JURISDICTIONS HAVE REQUIRED COMPLIANCE
WITH AN AUTO DEALER BOND CLAIM PROCEDURE

Arkansas requires a Judgment and then requires that the Judgment be presented to the Department of Financing Administration before a lawsuit can be brought against a surety. Hankins v McElroy dba Mac's Auto Sales, and Lawyers Surety Corporation 313 Ark 394, 855 S.W. 2d 310) (1993). The Arkansas Supreme Court stated:

> "Section 23-112-603 further provides that: the proceeds of the bond shall be paid upon receipt by the Director of the Department

> of Finance and Administration of a final judgment from an Arkansas Court of competent jurisdiction against the principal and in favor of an aggrieved party.
>
> ....."The record does not show the appellant availed himself of this administrative remedy. Instead of presenting his judgment to the Director of DF & A, appellant sought declaratory relief in the circuit court."
>
> ...."Clearly this is a procedure the legislature intended to be followed when it delegated regulatory jurisdiction of used motor vehicle dealers to DF & A....."
>
> (855 S.W.2d at 312)

Nevada requires a Judgment prior to making a claim on a cash auto dealer bond, or payment by the Director after review. After obtaining a Judgment the claimant is required to present its claim to the Director of the Department of Motor Vehicles for payment. The judgment is binding upon the surety or cash bond. (N.R.S. 482-345)

State of Nevada Department of Motor Vehicles v Garcia Mendoza 114 Nev 1187, 971 P.2d 377 (1998) held that this procedure must be followed in order to have a valid claim.

In Footnote 1 at 971 P.2d, at 379, the Supreme Court of Nevada stated:

> "The Honorable Justice Rose argues, in dissent, that the DMV had priority over Garcia-Mendoza because the DMV has a prior right of set-off and its claim was prior in time. This is not the case for two reasons: First, although it is true that the DMV had an earlier claim against the dealer, the DMV did not have an earlier claim against the bond. In fact, the DMV has never made a proper claim against the bond, because as discussed below, the DMV did not attempt to follow the statutory procedures specifically set forth for making such a claim. Instead, in an exercise of power unsupported by authority, the DMV simply helped itself to the money. Second, the DMV's common law right to set-off cannot take precedence over it s statutory

> duty to pay out on the bond in the manner established by the legislature. In this case, Garcia-Mendoza followed the statutory procedures for executing upon the bond; the DMV did not. In short, Garcia Mendoza perfected her claim first and is entitled to priority to the money."

In Frank et al v Hartford Accident and Indemnity Company 136 Misc 186, 239 N.Y.S. 397, (1930) the Supreme Court of New York County said:

> "The questions presented for determination thus relate to said payments by the defendant, aggregating $4,001.50. When paying the fund into the Court, is the defendant entitled to deduct such amount from the limit of $10,000 fixed in the policy on all judgments recovered upon claims arising out of the same transaction for bodily injuries or death. Considering first the payments in settlement of claims of $3,383.50: The provision as to the limit of insurance on all judgments was inserted in the policy pursuant to the statute for the protection of judgment creditors. It is specifically in the language required by the statute, and as such limitation applies only to judgments, any other liability under the policy is not affected by such limitation. When the insurer paid the claims on which no judgments had been obtained, it did so voluntarily, without regard to the limitation, which provides only for judgments, and it took the chance of being required to thereafter pay out the full limitation of $10,000 upon judgments.....
>
> 239 N.Y.S. 402

The results of these cases make sense. A surety bond is not insurance. It is an obligation based upon statutory parameters. Coverage and the process for claims can be changed, expanded or contracted as the legislature wishes.

D.
THE SURETY BOND IS NOT EXHAUSTED UNTIL PAYMENTS ARE MADE IN ACCORD WITH THE STATUTE

The Frank case holds that payments not made upon judgments are not to be credited to the obligation of the surety. Admittedly this is an old case that has not been cited, but it

appears to be the closest case on point.

The State of Nevada case seems to imply this same result wherein it directs the Nevada DMV to pay the cash bond claim to the perfected claimant, despite the fact that the bond money had been paid to itself at an earlier date.

Western Surety in its brief and before, criticizes the "volunteer" language in the Frank case as in conflict with Idaho Code 41-1839, but actually the "involuntary" language in 41-1839 helps Western Surety because it may be able to recoup its payments to the two auctions.

2.
IDAHO CODE 41-1839 CAN BE READ
AND RECONCILED WITH IDAHO CODE
49-1610 SO THAT BOTH STATUTES
ARE EFFECTIVE AND IN FORCE

In State Dept of Health and Welfare v Housel 140 Idaho 96, 104, 90 P.3d 321 (2004) our Supreme Court said the following with regard to statutory interpretation:

> "It is the duty of courts, in construing statutes, to harmonize and reconcile laws whenever possible and to adopt the construction of statutory provisions which harmonize and reconciles them with other statutory provisions."

Idaho Code 41-1839 is an attorneys fee statute. That is what the title says and that is how it reads.

Idaho Code 49-1610 can be read with this provision. Since Idaho Code 49-1610 requires a Judgment and provides for certain cutoffs for filing them as "claims"with the surety, the reference to a "claim" in Idaho Code 41-1839 when addressing auto dealer bond claims, refers to those that comply with Idaho Code 49-1610.

For example, if an auto dealer bond claim not reduced to judgment was presented to the surety and then a lawsuit filed after 60 days had passed, the Surety would presumably not be liable for attorneys fees and the lawsuit would be dismissed.

If a claim based upon a judgment was presented to the surety and the surety refused to pay within 60 days, then presumably the surety would be liable for the amount of the judgment and attorneys fees under Idaho Code 41-1839 if the claimant prevailed.

Obviously, a "claim" not reduced to judgment might be valid under different bond claims (fidelity, performance, or others) because many don't have the "judgment"requirement of Idaho Code 49-1610. Appellant Western Surety's brief discusses for example US Fidelity and Guarantee v Clover Creek 92 Idaho 889, 452 P.2d 993 (1969) but it does not deal with an express statutory bond or a judgment requirement.

A.
THE SENTENCE RELIED UPON
IN 41-1839 Subsection 3 SUPPLEMENTS
IDAHO CODE 49-1610 AND PROBABLY ALLOWS
WESTERN SURETY TO RECOVER ITS PAYMENTS FROM THE AUCTIONS

Western Surety emphasizes one sentence in the middle of subsection 3 of the Idaho Code 41-1839 which they essentially say overrules and nullifies Idaho Code 49-1610.

Appellant Western Surety has seriously misinterpreted the applicable sentence in subpart 3 and its effect.

The sentence states:

> ..."The surety shall be authorized to determine what portion or amount of such claim is justly due the creditor or claimant and payment or tender of the amount so determined by the surety shall not be deemed a volunteer payment and shall not prejudice any right of the surety to indemnification

and/or subrogation so long as such determination and payment by the surety be made in good faith."

First there must be a proper "claim". Idaho Code 41-1839 doesn't define the process for a claim on the auto dealer bond. Idaho Code 49-1610 does.

Next, if it determines that the "claim" is due, and makes a payment, the payment is not a "volunteer" payment. What does that mean?

Idaho Case law has defined payments which are made as a "volunteer" or "voluntary" and explained what is meant by those terms.

In Quintana v Quintana 119 Idaho 1, 802 P.2d 488 (1990) the Idaho Court of Appeals said that a personal representative that paid Federal Estate Taxes did not pay them as a "volunteer" so the personal representative was able to recover a proportionate payment from one of the heirs. This was because the personal representative was obligated by law to determine the tax liability and pay it.

In Shea v Owyhee County 66 Idaho 159, 156 P.2d 331 (1945) the Supreme Court held that certain taxes were required to be paid, and therefore they were not "voluntary payments" and applications for refunds could be made when new facts indicated some of the tax payments were excessive.

Thus surety payments are "involuntary" and all this means is that the surety can recover its payments through subrogation, indemnity from the principal, or even when wrongfully made to a claimant. It means that Western Surety can recover its improper payments from the auto auctions - and that is the course it should be pursuing, not an appeal of Nick Hestead's proper claim.

A good example and discussion of "volunteer" is found in Mobile Telecommunication v Aetna Casualty 962 F Supp 952 (E.D. Miss) wherein Aetna paid one million dollars on a claim and later became entitled to its money back. The Court reviewed Mississippi law, stating it is in accord with the general law on the subject, and concluded that the payment was made as a "volunteer" and that absent an agreement with the insured, or a mistake of fact, or fraud, Aetna couldn't recoup its payment.

Idaho Code 41-1839 (3) provides for the opposite result. The purpose of this sentence is to allow the Surety to recover its money if an improper payment is made, or to recover a payment from its principal, so long as the Surety is acting in good faith. These sentences are addressing "recovery" of money paid, not a claims process.

For example, if the surety paid $5000 on a claim, and the claimant decided to litigate against the surety and recovered nothing, the surety could demand that the claimant refund the $5000 payment it advanced. If the surety paid a Judgment under Idaho Code 49-1610, and the Judgment was later vacated because of an irregularity, the surety could recover its payment. In addition, since payments under Idaho Code 41-1839 are not as a "volunteer" a principal has difficulty refusing indemnification.

Going one step further, therefore, if the surety ignores Idaho Code 49-1610 and pays "claims" not reduced to a judgment, the surety can recover those payments to the two auto auction payments providing it can show it acted in good faith. Western Surety is in fact not subject to paying more than $20,000. It can recoup the "involuntary" payments it has erroneously made to the auto auctions.

3.

GOOD FAITH IS ONLY APPLICABLE TO WHETHER WESTERN SURETY CAN RECOVER ITS PAYMENT

Appellants brief misstates Nick Hesteads position regarding "Good Faith". His position is that good faith is not a legal defense to compliance with Idaho Code 49--1610, because legally there is no auto auction claim for Western Surety to pay because there simply is no judgment. So how can there be any "good faith" and not abide by the law?

"Good Faith" It is a standard by which the conduct of the surety is measured to determine whether the surety can recoup its payment from a wrongfully paid claimant, recover through indemnity, or recover through subrogation. It doesn't absolve Western Surety from complying with the statute. It does give Western Surety the right to recover its money as an "involuntary payor."

Western Surety is quite wrong when it says that Nick Hestead concedes there is good faith. Nick Hestead never asserted "bad faith" because Western Surety never claimed good faith applied to Idaho Code 49-1610, until it filed its Memorandum in Opposition to the Motion for Summary Judgment in November, 2010. Plaintiffs counsel sent several letters to Western Surety asking for reasons why Western Surety did not need to conform to Idaho Code 49-1610. No response talked about "good faith".

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[1] Western Surety's lack of good faith is demonstrated by:
Assistant Vice President Michael Dow in his letter where he presents the Judgment requirement (R.Vol II.32-33)..
Western Surety paid one bounced check and a second check plus around $2000. Nick Hestead is not ready to concede that the auctions had the right to withhold titles from bona fide purchasers.
Western Surety is well aware of the interpleader remedy.
There is no evidence that Western Surety made even a cursory attempt to determine if there were other claimants
Western Surety as an involuntary payor should have tried to recoup its money .
It is not clear that the Dealers Auto Auction check was a transaction with the corporation, instead of Ron Zechman personally.

4.

WESTERN SURETY CAN USE THE EQUITABLE INTERPLEADER REMEDY WHICH ELIMINATES THE NEED FOR JUDGMENTS

Aside from the law, a policy problem with Western Surety of ignoring the Judgment requirement and paying "claims" not reduced to judgments and sent directly to it by two auto auctions, is that legitimate claimants are left out of the process.

This can be solved by a proper interpleader that makes a reasonable attempt to give notice to all potential existing claimants. Some notice is necessary because those who read Idaho Code 49-1610 are led to believe that claims cannot be filed until 30 days after the judgment has been entered and a demand made upon the dealer. Unperfected claimants, are certainly left with the impression that a claim of any kind cannot be made until that event has occurred. Therefore, if Western Surety wants to discharge its liability "early" it needs to make a reasonable effort to contact all potential claimants and then use the interpleader remedy.

Interpleader can solve Western Surety's dilemma and Western Surety is well aware of it. Western Surety's counsel acknowledged this in his statement to the trial court:

> "..... Nobody disputes that there is an interpleader statute in the rule, and that seems to be the reason why counsel wanted to get the pleading in front of the court, which is to say, here's another case where Western Surety used an interpleader action. Nobody disputes the rule."
>
> (Transcript p. 4, Ll 8-15)

In fact Interpleader has been used by sureties in Idaho for almost a hundred years. (American Surety Co of New York v Mills 232 F.841 C.C.A Idaho (1916) (holding this

equitable remedy may be used, but no creditor should be preferred over another under the circumstances of the case).

The record shows that the remedy was used for auto bonds in the Tytan Motors and Boise Auto Brokers cases in 2000 and 2001. (R Vol II p 176 - offered into evidence by Western Surety).

Western Surety used this remedy in the reported case of Western Surety Company v Intrust Bank 20 S.W.3d 566 (Mo App W.D.2000)

Claims Manager Thomas Snyder acknowledged the interpleader remedy in his April 19, 2010 letter wherein he stated " An interpleader action does get filed in cases were (sic) there is more than one claim at the same time and the total amount of those claims is in excess of the penal sum." (R.Vol II p 187)

Thus, Western Surety can include perfected claims (judgments) and potential claims at one time, tender the amount of its bond, and close the file upon bonds which have no reasonable likelihood of indemnification from the principal and for which the claims are well in excess of $20,000.

And Interpleader notice is now even easier. ITD Dealer Licensing Supervisor Daryl Marler testified that he could easily get on the computer and pull up every complaint on a dealer that has been entered.(R 81 Marler Dep P 30 L 4-8).

5.
NICK HESTEAD REQUESTS
ATTORNEYS FEES ON APPEAL

Nick Hestead requests attorneys fees on appeal pursuant to Idaho Code 41-1839 (1), (4)

and IAR 41

According to Appellants memorandum this section is applicable to attorneys fees awards because this section and 12-123 are the exclusive remedies for obtaining attorneys fees in disputes arising out of insurance policies citing Mortensen v Stewart Title 149 Idaho 437, 447, 235 P.3d 387, 389 (2010). They claim Idaho Code 41-1839 applies.

Nick Hestead asks for attorneys fees pursuant to 41-1839 (1) (3) (4) as an intended.beneficiary under the bond. Hestead notes Smith v Great Basin Grain 98 Idaho 266, 281-282 (1977) which allowed a claimant to recover attorneys from a surety pursuant to this section. If Idaho Code 41-1839 does not apply then

RESPONDENTS CROSS APPEAL

1.
PLAINTIFF/RESPONDENTS CONTEND THE
DISTRICT COURT ERRED IN NOT AWARDING
THE SALES TAX AND LOAN INTEREST DAMAGE

Idaho Code 49-1610 provides that the bond will cover any "loss or damage" contained in the judgment. Trial Judge Susan Wiebe did not award damage claims for $750 in sales taxes paid, and $3729 in interest. (Tr. p 20). These items were awarded in Judge Morfitts judgment issued against Best of the Best Auto Sales Inc. Specifically the Judgment said:

> "And the COURT FINDS that the Plaintiff has been damaged as a result of these violations in the amount of $12,500 plus interest at the rate of 10.9% since June 8, 2007, in the amount of $3729 and sales tax damage of $750"
>
> (R.Vol 1 p 29 Judgment - last paragraph)

The original complaint filed in Hestead v Best of the Best Auto Sales Inc, and made a

part of the record by Western Surety, stated in Paragraph VI and XI

> "As a result of this breach, Plaintiff has been damaged in the amount of $12,500 in that the value of the vehicle is ½ of the value of an unbranded vehicle of good used quality plus a refund of sales tax in the amount of $750 plus interest Plaintiff paid on borrowed funds which he incurred in regard to the amount of $12,500 as proven at trial."
>
> (R.Vol I P 109 - Complaint Paragraph VI & XI)

Neither Western Surety nor Best of the Best ever challenged this Judgment by post trial motions of any kind, or by any collateral challenge. There is no question that Western Surety has had notice after notice of this judgment, and knew about the litigation prior to judgment. The Judgment was not appealed. Therefore, the finding by Judge Morfitt that these two items are damages is binding and final.

In any event the term "damage" includes this interest and sales tax damage.

In Taylor v Neill 80 Idaho 90, at 94, 325 P.d 391 (1958) our Supreme Court stated that "'Damages' is a broad term and includes special as well as general damage."

The amount of $750 is 6% of $12,500, and thus represents the amount of sales tax Nick Hestead was charged on money deceptively obtained by Best of the Best. Nick Hestead was in fact charged sales tax. (R.Vol 1 p 112 - "Tax Collected - $1500.00). Certainly, Hestead should not pay sales tax on an amount that he does not owe and which Judge Morfitt found he should never have paid.

Hestead also financed the purchase of this truck with his credit union. (R.Vol 1 p 101 - Dep Hestead P 12 L 10-11). In fact he will be paying on this loan until October 25, 2015. (R.Vol 1 p 104 Dep Hestead P 27 L 3-4)

The Idaho Court of Appeals has determined that loan interest can be a "damage"

In Spreader Specialists v Monroc Inc 114 Idaho 15 at 21 752 P.2d 617 (1988) the Court said:

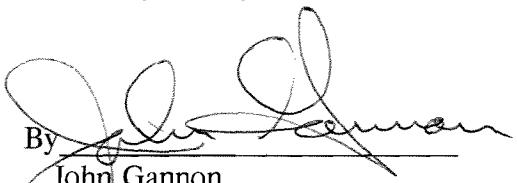
> "Idaho's appellate courts have never considered the precise question. Few courts have. However, the courts that have broached this topic seem to agree that amounts actually paid as interest on a loan obtained to remedy harm caused by wrongful conduct - such as breach of contract or tortious acts - are not prejudgment interest They are elements of consequential damages." (Cit om)
>
> .....
>
> Accordingly, we hold that interest charges incurred on a loan obtained in good faith, as part of a reasonable course of action to mitigate losses, may be recovered as an item of consequential damages. See generally Farmers Insurance Company of Arizona v R.B.L Investment Company 138 Ariz 562, 675 P.2d 1381 (Ct App 1983); Vining v Smith 213 Miss 850, 58 So.2d 34 (1952)

In our case, Nick Hestead borrowed money from his credit union to pay for the truck, and had to pay interest on the $12,500 value that he overpaid for the truck because of the misrepresentation by Best of the Best Auto Sales Inc. Hestead had no choice but to continue making payments on money that was taken from him by the deception of Best of the Best. His only alternative was to quit making payments, which would of course, result in a repossession.

CONCLUSION

The Judgment of the Trial Court should be affirmed except that the amount of the sales tax and the interest should be awarded as a matter of law, so that Nick Hestead should have a total judgment of $16,979.00. Nick Hestead should also be awarded his reasonable attorneys fees concerning this appeal.

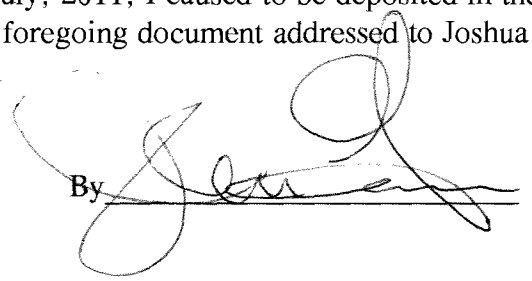
Dated this 22 day of July, 2011



By
John Gannon
Attorney for Plaintiff/Respondent/Cross Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 22 day of July, 2011, I caused to be deposited in the United States Mail two true and correct copies of the foregoing document addressed to Joshua Evett Elam Burke P.O.Box 1539 Boise, Idaho83701



By